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In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANA & MICHIGAN ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 7a-36a) are reported at 236 N.L.R.B. 986.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1979. A petition for rehearing was denied on January 16, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on April 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company withheld its employees' accumulated leave pay in retaliation for their strike activity, rather than for legitimate business reasons.

STATEMENT

1. Petitioner transports coal to various electric power plants by towboat and barge on inland waterways. The nature of petitioner's business ordinarily requires its employees to remain aboard boats for tours of 21 consecutive days, during which time the employees work two 6-hour shifts each 24-hour day. For each day spent by an employee aboard a boat, he is credited with one day of shore leave. Thus, for each day worked on the boat an employee earns wages for two days, the day worked and one day of leave. At the end of 21 days, the employees are ordinarily relieved by another crew and remain ashore on leave for the next 21 days. When the operation of the boats so requires, petitioner sometimes extends employees' tours on the boats beyond 21 days or recalls employees from leave before 21 days. (Pet. App. 8a, 16a.) In those instances, the immediate use of credited leave is temporarily postponed and days of shore leave continue to accumulate for use after the employees are relieved (Pet. App. 16a-17a; Tr. 72, 78-79).[1] Under no other circumstances has petitioner postponed or prevented employees from taking their accumulated shore leave (Tr. 47).

Each month is divided into two pay periods, the first covering the first 15 days of the month and the second covering the balance of the month. Each paycheck includes pay at the employee's job classification rate for the number of days in the pay period for which the employee is entitled to pay, whether work days or leave days. Stubs accompanying paychecks indicate the number of work days and shore leave days for which the employee is being paid. (Pet. App. 17a; Tr. 58-59.)

On November 17, 1976, the collective bargaining agreements between petitioner and the unions that represented its employees expired, and an economic strike commenced (Pet. App. 8a, 16a). Approximately half of the

[1] "Tr." refers to the transcript of the unfair labor practice hearing. "GCX" refers to the General Counsel's exhibits in that proceeding.

total complement of employees was on duty aboard boats on November 17, and virtually all of these employees left the boats and participated in the strike (Pet. App. 17a).

On November 18, the manager of petitioner's Riverboat Division mailed a written notice to all division employees announcing the pay policy to be followed during the strike (Pet. App. 17a). The notice stated, *inter alia* (Pet. App. 17a-18a; GCX 6; Tr. 26):

> Employees who left the boats and went on strike shall receive no pay from the time they left the boats. They shall not be put on accumulated leave pay status.
>
> Boat employees now on accumulated leave shall be kept on that status until 21 days from the time they last left the boat, or earlier if they had less than 21 days accumulated. If they do not come back to work then, their pay will stop.
>
> * * * * *
>
> Pay will begin for any employee when he returns to work.

2. Unfair labor practice charges against petitioner were filed by one of petitioner's employees and the United Steelworkers of America. A complaint issued and the Board concluded that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by implementing, in response to a strike, this policy of withholding accrued leave pay from employees until they returned to work. The Board found that petitioner's actions were motivated by "an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike" (Pet. App. 9a). The Board explained (Pet. App. 9a-10a):

> It was not until after the employees had gone on strike that [petitioner] promulgated the policy of refusing to pay employees accumulated leave until they return to work. Each employee who had been on duty at the inception of the strike was informed that he would

receive no pay from the time of the strike, that he would not be placed on accumulated leave pay status, and that "pay will begin for an employee when he returns to work." If the employees who had already been on leave did not report for work, i.e., abandon the strike, after the 21-day period, all pay would stop regardless of whether that employee had additional accumulated leave time. Again, pay would begin when the employee returned to work, despite the fact that, for both groups of employees, the pay had already been earned.

The purpose of the leave policy clearly was to force employees to abandon the strike. Whether or not [petitioner] also had valid business reasons for withholding pay already earned is of no consequence here. [2] Such discriminatory action, in retaliation for employees' exercise of rights guaranteed in Section 7 of the Act, is prohibited.

The Board entered an appropriate remedial order (Pet. App. 10a-12a, 29a-30a).

3. The court of appeals found the Board's order to be "based upon substantial evidence" and granted enforcement of it (Pet. App. 1a-2a).

ARGUMENT

Petitioner contends (Pet. 12-13) that this case presents the issue of whether, during a strike, a company may, for legitimate business reasons, alter its method of scheduling paid leave time that has not been earned or accrued at the time of the strike. This contention is incorrect. The Board,

[2]The Administrative Law Judge had concluded (Pet. App. 26a-27a) that the Company "had a legitimate, but insubstantial, business reason for its action," which, in view of the "serious, adverse impact on employee rights," did not justify the action within the rationale of *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). The Board expressly stated (Pet. App. 8a) that it did not rely on the Law Judge's rationale.

upheld by the court of appeals, found (Pet. App. 9a) that petitioner had denied its employees leave pay that was earned and had accrued. Moreover, the Board found, and the court below sustained its finding, that petitioner's action was not motivated by a legitimate business justification, but by a desire to coerce its employees into abandoning the strike.[3] The only issue actually presented therefore is whether substantial evidence supports those findings. That issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the facts set forth above demonstrate that there is ample support for the Board's findings.

[3]Petitioner's assertion (Pet. 14) that the Board "evidently concluded that the [petitioner's] policy of deferring leave and leave pay was conduct inherently destructive of employee rights, thereby obviating the need to consider business justification," misinterprets the Board's decision. The Board did not consider business justification because it concluded that, whether or not valid business justification existed, petitioner was not motivated by such purpose. As this Court stated in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963):

> When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous [employer] actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. * * * Such proof itself is normally sufficient to destroy the employer's claim of legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights.

The Board decision here, contrary to petitioner's suggestion (Pet. 13), is consistent with *NLRB* v. *Borden, Inc.*, 600 F. 2d 313 (1st Cir. 1979). There the court, citing *Great Dane*, *supra*, held that where the employer asserts a substantial business justification that is not inherently destructive of employee rights the Board can reject such justification only if reliance on it was "pretextual." 600 F. 2d at 321. Here the Board, in ruling that petitioner's action was motivated by an intent to coerce employees to abandon the strike, did find that reliance on a business justification was pretextual.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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